CHRISTIAN, DILLON, EDWARDS ET AL.

v.

NORTHWESTERN GENERAL HOSPITAL ET AL.

92-00110

DECISION OF JEFFRY A. HOUSE

Board of Inquiry

# INTERIM DECISION (DISCLOSURE)

This preliminary motion was argued before me on June 29, 1993. It will be necessary to set out some background in order to properly appreciate the context in which the question falls to be determined.

On December 18, 1992, I was appointed as a Board of Inquiry by the Minister of Citizenship to inquire into a number of complaints alleging discrimination in employment by ten persons, all of whom were or are registered nurses at Northwestern General Hospital. The complaints allege discrimination in employment on the grounds of race, colour, harassment, ethnic origin, place of origin and reprisal by Northwestern General Hospital and ten named Respondents. Following a conference call and an unsuccessful application for party status by the Ontario Nurses Association, counsel for all the Respondents, Ms. Baker wrote Mr. Hart, counsel for the Ontario Human Rights Commission on June 10, 1993 requesting disclosure and production of:

> all documents that were, or are in the Commission's possession relating to the factual history from which the above-noted complaints arose, including any documents obtained during the investigation and any documents obtained from the complainants.

On June 17, 1993, Mr. Hart, counsel for the Commission responded. He indicated first that "the Commission will be making disclosure of all source documents in the Commission's possession relevant to the subject matter of the complaints before the Board of Inquiry". Secondly, he agreed to provide copies of statements provided by thirteen persons, some of whom are individual respondents before me, and others referred to as "management representatives".

Thirdly, however, he indicated that "the Commission will not be disclosing any statements obtained from the complainants or from third party witnesses, nor will the Commission be disclosing any notes or records created by or for the officers during the course of, or for the purpose of the investigation."

At the same time, both the Commission and the Respondent requested that I sign subpoenas duces tecum pursuant to s. 12(b) of the Statutory Powers Procedures Act, R.S.O. 1990, c. S-22 requiring that witnesses appear before me, and produce certain documents.

Exhibit C-2 contains the subpoenas issued at the request of the Respondents, and requires that each of six subpoenaed persons produce, with respect to certain numbered files:

1. Any and all documents obtained or copies from the Respondent Hospital or the individual Respondents in the above-noted Complaints, during or arising from the investigation of the above-noted Complaints;

2. Any and all records and documents, including tapes, memos, letters, notes, witness statements, tables, transcripts, charts, summaries, lists, statistical analyses, and/or drafts arising through or obtained, collected or created during the investigation of any of the above-noted Complaints or during the investigation of any matters such as similar fact allegations flowing from the investigation of the Complaints, save and except those documents covered by solicitor-client privilege.

Exhibit C-3 contains the subpoena issued on behalf of the Commission. It directs Mr. Glenn Yaffe to produce documents which are listed in a twenty-seven page Appendix thereto.

Both subpoenas were returnable before me on June 29, 1993. At that time, Mr. Hart moved that the subpoenas in Exhibit C-2 be quashed. He submitted that the said summons were premature, and an attempt to obtain prehearing discovery.

Ms. Baker advised me that the Hospital did not oppose the subpoena concerning Mr. Yaffe, but requested direction from me as to the timing of that disclosure. After some discussion with counsel, I ordered all files on the individual complainants to be made available by July 22, 1993, and all other relevant files to be made

available on July 29, 1993.

Ms. Baker also conceded that her subpoenas were premature in the sense that s. 12(1)(b) does not envisage prehearing disclosure, but rather exists to require that documents and things "be produced in evidence at a hearing".

The matter proceeded, however, on the footing that both parties required direction as to what, if any, further documentation the Commission ought to be required to disclose. It will be most convenient to set out the arguments of the parties before entering into a legal analysis.

The Commission's Position

Mr. Hart requested that there be a formal order quashing the subpoena as premature.

However, given that my power under s. 12 of the Statutory Powers Procedure Act may require eventual production of documents at a hearing, and further given the probable need for an adjournment at that stage, to enable counsel to familiarize themselves with the material produced, Mr. Hart set out the Commission's position with respect to further disclosure and undertook to provide any materials ordered produced prior to the next scheduled date for the hearing, to obviate the need for further adjournments. The Commission argued that further disclosure of other material ought not to be ordered, as that information is privileged. Two aspects of the law of privilege were cited: first, the privilege relating to conciliation, and second, the privilege with respect to documents prepared in preparation of litigation.

The first of these privileges arises out of the obligation, set out in s. 33 of the Human Rights Code that the Commission attempt to endeavour a settlement of a Complaint. Admissions, concessions and

offers to settle made at this stage ought never to be subject to the requirement to disclose, he argued. Should it be otherwise, parties would become far more circumspect in their dealings at the reconciliation stage, with the result that the legislative objective set out in s. 33 would be undermined.

Secondly, the Commission based its refusal to disclose other material on the privilege which exists concerning documents prepared in contemplation of litigation, the so-called "lawyer's file" privilege. Mr. Hart cited Salamon v. Searchers Paralegal Services 1987 8 C.H.R.R. D/4162; and Adair v. K.V. Home Insulation Ltd. (1992) 15 C.H.R.R. D/331; and Waterman and Ontario Human Rights Commission v. The National Life Assurance Co. of Canada et al., Unreported, December 8, 1992, W. Gunther Plaut, Chair.

Mr. Hart also argued that the case of R. v. Stinchcombe [1991] 3 S.C.R. 326 has no applicability to human rights law, and referred to the analysis offered by Chairman Plant in Waterman, (supra).

The Position of Counsel for the Complainants

Ms. Wilkie, counsel for all the Respondents, supported the Commission's position. She indicated that her clients were engaged in the equivalent of civil litigation, and that therefore their interaction with the Commission should be subsumed under the "lawyer's work product" privilege. Further, she indicated that she would be concerned, were those who offered information to the Commission, and who would not be called to testify, to be identified and the contents of their assistance provided to the Respondent employer.

The Position of Counsel for the Respondents

Mr. Baker, for the Respondents, referred to the two cases to argue

for broad pre-hearing disclosure. The first of these, R. v. Stinchcombe (supra) significantly widened the Crown's obligations for disclosure with respect to criminal defendants. Ms. Baker argued that Mr. Justice Sopinka's reasoning in that case applied in principle to the Commission's investigatory process. She referred further to Dudnik v. York Condominium Corp., et al. (1990) 12 C.H.R.R. for the proposition that is important to separate the Commission's investigative and conciliation processes, and that documents obtained through the investigative stage would only very exceptionally be privileged. She also supplied me with a number of cases which establish that, for privilege to be successfully asserted with respect to a document under "lawyer's work product" doctrine, it must be shown that the document was brought into existence with the dominant purpose of using it, or its contents to obtain legal advice or to conduct or aid in the conduct of litigation. Voth Bros. Construction (1974) Ltd. v. North Vancouver Board of Trustees et al. (1981) 23 C.P.C. 276; 600254 Ontario Ltd. c.o.b. Port McNicoll Tavern v. Zurich Insurance Co. (1988) 27 C.P.C. (2d) 221.

Ms. Baker argued that any interviews conducted by Commission staff, and any statement given, were not prepared with the dominant purpose of obtaining legal advice or to conduct litigation. That, she said, was only one, and perhaps a subsidiary purpose.

As I conceive it, the following statutory enactments are relevant to my power to order disclosure in a given case:

1. The Statutory Powers Procedure Act, s. 8, which reads:

   Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. R.S.O. 1980, c. 484, s. 8.

2. The Statutory Powers Procedure Act, s. 12:

   (1) A tribunal may require any person, including a

party, by summons:

(a) to give evidence on oath or affirmation at a hearing; and
(b) to produce in evidence of the proceeding and admissible at a hearing. R.S.O. 1980, c. 484, s. 12(1).

3. The Statutory Powers Procedure Act, s. 23:

(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

4. The Human Rights Code, s. 39(4).

(4) Where a board exercises its power under clause 12(1)(b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production of in evidence of documents or things, it may, upon the production of the documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

As well, I am under a duty to observe the rules of natural justice to ensure that all parties are given a fair hearing; Cardinal v. Director, Kent Institution [1985] 2 S.C.R. 643. It has long been recognised that the requirements of natural justice in a given case will depend upon the circumstances of that case, the nature of the inquiry, and its subject matter, among other things. Russell v. Duke of Norfolk [1949] 1 All E.R. 109 at 118. This principle was accepted as having application in Canada in A.G. Canada v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735 at 747. The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue, and the severity of consequences to the individuals concerned: Singh et al. v. M.E.I. (1985) 58 N.R. 1 at p 14.

As I understood the argument made by Ms. Baker, it was that a fair opportunity to answer the case is similar to the right to full

answer and defence in a criminal case, and thus the content of a fair opportunity to answer must include the right to obtain all relevant material, as set out in Stinchcombe, subject to the various caveats and limitations in the judgment itself. The applicability of Stinchcombe to human rights litigation thus presents itself as a central issue, as counsel for the Commission, Mr. Hart, has argued that it has no application to a case such as the one before me.

Is there an analogy between the duties of Crown counsel in a criminal proceeding and the Commission counsel in a Human Rights Code proceeding? Boards of Inquiry have not been unanimous on this issue. Under s. 29(i) of the Human Rights Code, the Commission is given the function of enforcing the Code. Where a Board of Inquiry has been named, s. 39(2) of the Code provides that the Commission is to be a party, and that it shall "have carriage of the complaint." It was no doubt that the existence of these duties which led to the Board of Inquiry in Dudnik, supra, to state that:

> [63] Moreover, being the entity charged with furthering the public policy underlying the Code, the Commission is not an adversarial party to a respondent in the fashion of adversarial parties in a civil action. Rather, in this regard its role is analogous to the Crown in a criminal proceeding. The Crown in a criminal proceeding is expected to give full disclosure of all relevant evidence, even that which might defeat the Crown's case. From a practical standpoint, generally counsel to the Commission will provide counsel for a respondent with copies of the documents intended to be relief upon by the Commission. and a disclosure statement, in advance of the hearing.(See J.I.Laskin, "Administrative Law: Practice under The Ontario Human Rights Code." The Canadian Bar Association, Ontario Branch, Continuing Legal Education (April 29, 1983), at p. 8.) (Emphasis added)

However, in Waterman, supra, the Board rejected any analogy with the criminal law, relying for this in substantial part on th interim decision of Prof. T. Brettel Dawson in Anita Hall v. A-1 Collision and Auto Service and Mohamed Latif, (Unreported Bd. of

Inquiry Interim decision, August 28, 1993).

In Hall, however, the central issue analyzed by Prof. Dawson had to do with whether a proceeding under the Human Rights Code interfered with the rights of Mr. Latif under s. 7 of the Canadian Charter of Rights and Freedoms. Since that section of the Charter guarantees the rights to life, liberty, and security of the person, and the right to not be deprived of those rights except in accordance with the principles of fundamental justice, Prof. Dawson discussed whether a Human Rights Code proceeding could be analogised with the Criminal Code from the point of view of the applicability of s. 7 of the Charter. She therefore discussed the clearly penal aspects of the Criminal Code, as well as its early interference with the liberty of the subject, and concluded that a human rights proceeding has a remedial, rather than a penal character, and that therefore, s. 7 of the Charter is inapplicable. I do not read her reasons as necessarily implying that no analogy between Crown counsel and the Commission counsel exists with respect to the duty to disclose the case.

Furthermore, I believe Hall exaggerates the differences between criminal and human rights law. For example, the suggestion that a human rights complaint may be made as of right, while a criminal complaint requires a police investigation, is, I believe, untenable since the holding of the Supreme Court of Canada in Dowson v. The Queen, (1983) 7 C.C.C. (3d) 527 (S.C.C.). The statement that "unlike the laying of a criminal charge, the filing of a human rights complain implies no suspicion on the part of a public body of wrongdoing", which was also relied upon in Waterman, is, I believe, inexact. The laying of an information by a member of the public is a matter of right, as Dowson makes clear. Only after a justice has made appropriate inquiries under s. 507 of the Code, and decided to proceed with the charges, does a public body allege wrongdoing. Similarly, while a complaint under the Code may be filed as of right, no public body suggests wrongdoing until the

Commission makes a request of the Minister under s. 36 of the Human Rights Code.

In Waterman, then, Chairman Plaut relies on Hall to reject any analogy with criminal proceedings. He also adds another reason for refusing to apply Stinchcombe:

> Respondent counsel has implied that there may be evidence in the officer's notes which is withheld because it is favourable to the Respondent, and that therefore, as in Stinchcombe, the notes ought to be produced.
>
> Personal experience leads me to believe that this implication is unjustified. The officer comes to the investigation without any apprehension of who is rights and who is wrong. The Commission becomes a partisan only after the Commissioners, by vote, agree that a *prima facie* infringement of the Code has occurred and therefore ask the Minister to appoint a Board of Inquiry. Until then, the Commission is an impartial searcher for the truth. Its agents and officers may not always carry out their tasks to perfection, and certainly often are seen as antagonists by potential respondents, but the kind of truth shading of which the police in Stinchcombe were suspected should not be laid at the door of the Commission.

With respect, I do not believe that Stinchcombe is founded upon an allegation of truth-shading by the police. Rather, the Court found that the Crown had refused to disclose certain statements to the defence, based upon a Crown assessment that the statements were not capable of belief. The Court found that it was inapposite that disclosure be denied since it was for the defence to determine whether the statement was of use.

For these reasons, I reject the view that protections developed in the context of criminal law may never have application to human rights proceedings. For example, the doctrine of abuse of process, while initially a doctrine of the civil law, has been enriched and modified by holdings of the criminal courts, and was then incorporated into the Statutory Powers Procedure Act, s. 23. It

seems to me that the true principle is that those doctrines which arise in criminal law, and are directly related to the fairness of a given proceeding, ought to be carefully considered in a given administrative law context, before they are found to be inapplicable.

In Selvarajan v. Race Relations Board [1976] 1 All E.R. 12, at 19, Lord Denning stated that the administrative law principle of fairness as follows:

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.

It is obvious that this statement of the doctrine of fairness requires only that a person "be exposed to proceedings" or "adversely affected" for him or her to acquire the right to be told the case against him or her, and be given a fair opportunity to meet it.

It is important to keep in mind that the incorporation of the fairness doctrine into s. 7 of the Charter in Canada did not extinguish the doctrine in non-Charter contexts; rather the absence of a Charter ground on which to found a complaint as to the fairness of a hearing means only that there can be no Charter remedy. Thus, it is no answer to refuse to apply the doctrine of fairness only because "life, liberty, or security of the person" are not at issue.

That being said, I now turn to the question of whether the Crown's duty to disclose as set out in Stinchcombe ought to be applied, in whole or part, to proceedings under the Human Rights Code.

The Crown's duty to disclose originated in the common law, and does not require reference to the Charter; LeMay v. R. [1952] 1 S.C.R. 232; R. v. M.H.C. 123 N.R. 63 (S.C.C.) p. 73. While American law respecting disclosure rights tend to be based upon the 14th Amendment right to due process (see, for example, Brady v. Maryland, 373 U.S. 83, U.S. v. Agurs (1976) 96 S. Ct. 2392; U.S. v. Bagley, 437 U.S. 667 (1985)); the British rules are based on general notions of fairness. For example, in Phillipson v. The Queen, (1990) 91 Cr. App. R. 226, Gibson, L.J. referred to certain guidelines adopted by the Attorney General with respect to disclosure and stated at p. 233:

> The main purpose of those guidelines is to ensure that in presenting a prosecution the Crown does not unfairly, or without sufficient reason, select out of the material available to it only those matters which support the prosecution case and keep other material possibly helpful to the defence, from the knowledge of the defence".

Furthermore at p. 235,

> the basic principle that the prosecution must include all probative material on which it intends to rely, and must tender it as part of the prosecution case, does not form part of our law because the law wishes to help liars to tell more convincing lies, but because an accused needs to know in advance the case which will be made against him if he is to have a proper opportunity of giving his answer to that case to the best of his ability. The accused is also entitled when he decides whether or not to go into the witness box to give evidence, to know what the case is which he has to meet.

It will be seen that the requirement of production is based upon the need of the defendant to know the case against him in advance so that he may properly answer it. The Court determines that a trial not held in accordance with these principles runs the risk of being unfair.

Turning to the Canadian situation, the Court in Stinchcombe provided the following contextual remarks:

> Production and discovery were foreign to the adversarial

> process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on.

Then, after referring to certain conclusions of the Marshall Commission Report, Mr. Justice Sopinka, writing for a unanimous Court, states:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. States at pp. 23-24
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> It cannot be over-emphasized that the purpose of criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not

> the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

I ask myself, then, what the duty of fairness reasonably requires in the way of disclosure of the case in this legal and administrative context. Does the refusal to disclose the materials sought amount to a breach of fairness?

The case before me involves the allegation that a hospital, along with certain named individuals, practices systematic discrimination based upon colour, race, and associated unlawful bases. In doing so, it is alleged, they excluded those so discriminated against from positions which they were otherwise entitled to. While I have been told no more of the allegations than this, it appears to me that the allegations are very serious indeed, with the potential, if made out, to ruin reputations, and case a pall over the future career prospects of anyone found to have so discriminated.

In a case such as this, I have decided that the Stinchcombe doctrine ought to be applied. The exclusion of the element of surprise in the interest of the fairness of a hearing is, I believe, now required. Thus, any relevant materials not otherwise privileged ought to be disclosed to counsel for the Respondents.

The Claim of Privilege

In this case, Commission counsel has relied upon two grounds of privilege. First, as noted above, Mr. Hart asserted that some of the materials were sought were privileged as relating to the conciliation process. Ms. Baker did not contest this point, and I am in full agreement that any document specifically prepared for conciliation, and any statement or admission made in the conciliation process proper, are privileged, and ought not to be divulged.

It is with respect to the second ground of privilege that I find myself in disagreement with the Commission's position. As I understand the argument, it was that any statement taken, and any fact uncovered, by any member of the staff of the Human Rights Commission at any time must be understood as being "in contemplation of litigation", and therefore part of the "lawyer's work product", and thus privileged.

I prefer the reasoning of the panel in Dudnik, (supra at D/334) which separates the investigation stage from the subsequent conciliation stage, and, I would add, from the third, "prosecution" stage, which arises once a Board of Inquiry has been appointed. In my view, the panel in Dudnik is correct that documents, including statements reduced to writing, would only very exceptionally be privileged at the investigation stage.

Continuing with the analysis, materials produced for the conciliation stage, including materials in which the strengths and weaknesses of the case are assessed by Commission employees, are privileged. At the final, "prosecutorial" stage, communications with Commission counsel or his or her agents would also be privileged, as would any reports commissioned for the purposes of litigation. It is my view that this result is a function of the reasoning of the courts which require that privilege on these grounds be extended only to those materials, which were produced with the dominant purpose of litigation in mind.

In the case before me, I do not believe anything turns upon the precise timing of disclosure, as we are within three weeks of the beginning of the hearing. However, in the Human Rights context, and more particularly where, as here, an employer is among the alleged human rights violators, the timing of disclosure should be entirely in the hands of the Commission counsel, whose decisions, absent a showing of oblique motive, must be respected as those of an officer in the Court. It would be poor Human Rights Code

proceedings indeed which demand too early disclosure of the statements of witnesses in a context where they were subject to harassment from those in authority. Similarly, it may be that, in a given case, witness statements will have to be edited prior to disclosure to insure that identities may not be prematurely and inappropriately disclosed.

Order

As a result of these considerations, I order the subpoena issued on behalf of the Respondents, Exh. C-2, be quashed as premature.

I order the Commission to provide the Respondents all statements made by the Complainants to the Commission and its investigators at the investigation stage, whether reduced to writing or copied by mechanical means. I further order the Commission to provide the Respondents with the statement and identity of any witness interviewed by the Commission or its agents, who the Commission does not propose to call and whose statement might reasonably aid the Respondents in answering the Commission's case.

JEFFRY A. HOUSE
Chairman

July 27, 1993